RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the courts. No pains are spared in selecting *all* the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

BILLS AND NOTES — LIABILITY AND CONTRIBUTION BETWEEN ACCOMMODATION INDORSERS. — When one of two accommodation indorsers of a bill of exchange pays the debt, he may recover the full amount paid from a prior accommodation acceptor, though he knew at the time of the indorsement that the acceptance was for accommodation: the acceptor has no claim for contribution against subsequent accommodation indorsers with notice. *Gillespie et al.* v. *Campbell*, 39 Fed. Rep. 724 (Ill.).

BILLS AND NOTES — PAYABLE ON DEMAND. — An instrument in the form of a promissory note, in which no date is mentioned for payment of the principal, but in which is a provision for the semi-annual payment of interest, and in default of prompt payment of interest within 30 days after it is due, then the note shall be due and collectable, is a negotiable promissory note. *Roberts* v. *Snow*, 43 N. W. Rep. 241 (Neb.).

COMMON CARRIERS — LIMITATION OF LIABILITY — BURDEN OF PROOF. — Where, by special contract, the liability of a common carrier of goods is limited to loss or injury through his negligence, after loss or injury is shown by the plaintiff, the carrier must show that he was not negligent, that the loss or injury occurred from some cause other than his negligence. *Hull* v. *Chicago, St. P., M. & O. Ry. Co.*, 43 N. W. Rep. 391 (Minn.).

COMMON CARRIERS — REGULATIONS AS TO FARES. — A regulation requiring passengers who board the cars without purchasing tickets to pay twenty-five cents extra is not unreasonable, and a passenger who refuses to comply with such regulation may be lawfully ejected in a proper manner, and at a proper place. The fact that the company gives a drawback coupon for the extra fare does not affect the validity of the regulation. *McGowen* v. *Morgan's S.S. Co.*, 6 So. Rep. 606 (La.).

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — INJUNCTION AGAINST LIQUOR NUISANCE. — Mass. St. 1887, c. 380, § 1, gives to the Supreme and Superior Courts jurisdiction in equity, upon petition of not less than ten legal voters of any town or city, setting forth the fact that any building, place, or tenement therein is used for the illegal keeping or sale of intoxicating liquors, to enjoin the same as a common nuisance. On a motion by petitioners under this statute for a preliminary injunction, it was contended by the defendant that the statute was unconstitutional, as conflicting with article 12 of the Declaration of Rights which provides that "no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, . . . but by the judgment of his peers or the laws of the land." *Held*, that the statute was constitutional on the ground that the proceeding, authorized by the statute, is one to abate a nuisance, and looks only to the property that, in the use made of it, constitutes the nuisance. Such a procedure is a well-established branch of the jurisdiction of equity, and the defendant is not deprived of his property or privileges contrary to the law of the land. *Carleton et al.* v. *Rugg et al.*, 22 N. E. Rep. 55 (Mass.).

This decision is in line with that of the U. S. Supreme Court, in *Kansas* v. *Ziebold*, 123 U. S. 623, which it approves. There is, however, an able dissenting opinion by Field, J., with whom concur Devens and W. Allen, J.J. The ground of the dissent is that the statute is designed not for the protection of property rights, but to secure a more effective execution of the liquor laws, by means of the peculiar power of an equity court to punish for contempt. Such an attempt to administer criminal law by a procedure which does not afford the offender the privilege of a jury trial is not in accordance with the law of the land, and hence opposed to art. 12 of the Declaration of Rights. In accord with the decision see *Littleton* v. *Fritz*, 65 Ia. 488, and *State* v. *Crawford*, 28 Kan. 726; contra, see *State* v. *Uhrig*, 14 Mo. App. 413.

CONSTITUTIONAL LAW — JUDICIAL AND EXECUTIVE POWERS. — Act N. J., 1889, provides that, when an action to try title to an office, to which the Mayor appoints, is begun, the Chief Justice of the Supreme Court shall, on application, appoint a special term for hearing it; and on such application the Chief Justice shall summarily determine which of the claimants of the office shall discharge its duties pending the action. *Held*, by the last clause a judicial and not an executive power was intended to be conferred. The only method of ousting one colorably and peaceably in possession of a public office is by writ of *quo warranto*, which is one of the prerogative writs of the Supreme Court, and, except as to form, beyond legislative control. This clause is, therefore, an attempt to grant to the Chief Justice a power which belongs inalienably to the Supreme Court, and is therefore a nullity. If the power were executive, the act would still be unconstitutional, under the provision in the N. J. Const. which declares the separation of the judicial, executive and legislative departments. *In re Cleveland, Mayor*, 17 Atl. Rep. 772 (N. J.).

CONSTITUTIONAL LAW — REGULATION OF COMMERCE. — "Act Minn., April 16, 1889, prohibiting the sale within the State of dressed meat, unless the animal within twenty-four hours before slaughter was inspected by State officers and found healthy and suitable for food, having the effect of excluding dressed meat slaughtered outside the State, is unconstitutional as usurping the power of Congress to regulate interstate commerce, and as abridging the privileges and immunities of citizens of other States." *Swift* v. *Sutphin*, 39 Fed. Rep. 630 (Ill.); *in re Christian*, ib. 636 (Minn.); *in re Barber*, ib. 641 (Minn.).

A similar statute of Indiana was declared unconstitutional for the same reasons in *Harvey* v. *Huffman*, 39 Fed. Rep. 646 (Ind.).

CONTRACTS — VOID AS AGAINST PUBLIC POLICY. — A contract made by a board of supervisors with a county treasurer, whereby the latter was allowed a certain per cent. on all delinquent personal property taxes collected by himself, is void as against public policy, inasmuch as it allows greater compensation to a public officer than that fixed by law, and puts a premium on negligence in the discharge of his duty. *Adams County* v. *Hunter et al.*, 43 N. W. Rep. 208 (Ia.). See also *Lancaster County* v. *Fulton*, 18 Atl. Rep. 384 (Pa.).

DECEIT — FALSE STATEMENTS MADE IN GOOD FAITH. — The directors of a tramway company issued a prospectus in which they stated that they were authorized to use steam power, and that by this means a great saving in working would be effected. At the time of making this statement, they had not, in fact, obtained authority to use steam power, but they honestly believed that they would obtain it as a matter of course. *Held* (reversing the judgment of the Court of Appeal, 37 Ch. D. 541), that they were not liable in an action of deceit brought by a shareholder who had been induced to apply for shares by the statement in the prospectus. The defendants honestly believed that the statement made was substantially true. It would seem that on a true construction of the facts they had reasonable grounds for this belief, but it was not essential that their belief should be based upon reasonable grounds.

In order to sustain an action of deceit there must be proof of fraud, and nothing short of that will suffice. Fraud is proved when it is shown that a false statement has been made (1) knowingly; (2) without belief in its truth; (3) recklessly. But if a man makes a false statement honestly believing it to be true, it is not sufficient to support an action of deceit to show that he had no reasonable grounds for his belief. *Derry and others* v. *Peek*, 61 L. T. Rep. N. S. 265 (Eng.).

The House of Lords was called upon to interpret the facts of the case. As three of the five Lords expressly held that, on these facts, the defendants had reasonable grounds for their belief in the truth of the statement made, it may perhaps be questioned how far their opinions, as to the effect of an honest belief not based upon such ground, contain a necessary *ratio decidendi*. The Lords expressly repudiated, however, the law laid down by the Court of Appeal, that the belief in the truth of a statement made is not a defence to an action for deceit unless the belief is based upon reasonable grounds. Criticising the opinions of the Lords Justices, Lord Bramwell says: "I think, with all respect, that in all the judgments there is, I must say it, a confusion of unreasonableness of belief as evidence of dishonesty, and of unreasonableness of belief as of itself a cause of action."

The point of law here treated does not seem to have been very fully discussed

in the American cases, but their tendency seems to be opposed to the view of the House of Lords. See Cooley, Torts, 501 and cases there cited. For a very able discussion of the principal case, see an article by Sir Frederick Pollock, in 5 L. Q. Rev. 410.

DOWER — NATURE OF THE RIGHT DURING HUSBAND'S LIFE. — The contingent right of a wife, during the husband's life, to dower in his real estate, is property of a substantial value. The release of this right, by joining in a mortgage of the husband's lands to secure his debt, inures only to the benefit of the mortgagee; the entire interest of the husband shall be used to discharge the mortgage before resorting to the wife's contingent right, and whatever surplus from the sale of the land remains after discharging the mortgage shall be used to satisfy the wife's right in full, before the judgment creditors of the husband obtain anything. *Mandel* v. *McClare et al.*, 22 N. E. Rep. 290 (Ohio).

EQUITY JURISDICTION — OBLIGATIONS IMPOSED BY LAW. — The charter of a railroad company authorized it to construct its road across highways on condition that any highway so crossed should be restored to its former good condition. Under this charter it had constructed a certain bridge as a highway crossing. This bridge falling into decay, the defendant railroad refused and failed to repair it, whereupon the county replaced the bridge with one suitable for travel, and substantially the same as the former one. The county commissioners filed a bill to require the railroad to repay the expense incurred in rebuilding this bridge. Decree was entered granting this relief. *Chesapeake O. & S. W. R. Co.* v. *Dyer County*, 11 S. W. Rep. 943 (Tenn.).

EQUITY JURISDICTION — OBSTRUCTION TO WATER COURSES. — An upper riparian owner built a dam for the purpose of supplying a neighboring town with water. This diversion the court held to be unlawful because it was an extraordinary and artificial use of water; yet, as the plaintiff did not show any special damage, equity would not interfere, but would leave the plaintiff to his action at law. *Ulbricht* v. *Eufaula Water Co.*, 6 So. Rep. 78 (Ala.).

ESTOPPEL — BY CONDUCT. — A tax-payer signs a petition for the passage of an ordinance levying a special tax for the purpose of rebuilding a court house, which has been burned, and afterwards voted for such ordinance. *Held*, that he will be estopped from setting up the illegality of the tax as a defence against payment of it, as he was benefited by the rebuilding of the court house. *Andrus* v. *Board of Police of Opelousas*, 6 So. Rep. 603 (La.).

HIGHWAYS — STREAMS USED FOR DRIVING LOGS. — The public has a right to use as a highway not only tidal rivers and fresh-water navigable rivers, but also such streams as are capable of floating logs or timber. In order to entitle the public to use it as a highway, the stream need not be at all times capable of floating logs, but it will suffice that when the water is high it is thus capable, for such a length of time as would make it useful and profitable for the public to so use it as a highway to float logs to mill or market. *Gaston* v. *Mace et al.*, 10 S. E. Rep. 60 (W. Va.).

The doctrine of this case is becoming pretty well established in this country, though denied or modified in some states. See 2 Gray, Cases on Property, 579, n.

INSURANCE — CANCELLATION OF POLICY — ESTOPPEL. — A policy provided that it might be cancelled on giving notice to the assured and repayment of the premium. Notice of cancellation was given, but the premium was not refunded. *Held*, as the assured showed by his conduct that he regarded the policy as cancelled, and thereby, presumably, induced the company not to make a formal tender of the premium, he is estopped to set up the non-payment. *Hopkins et al.* v. *Phœnix Ins. Co.*, 43 N. W. Rep. 187 (Ia.).

LANDLORD AND TENANT — DANGEROUS PREMISES. — Defendants, having a vested remainder in a pier, came into possession thereof subject to an outstanding lease. The pier was out of repair when the lease was executed. *Held*, although the defendants had the right, but not the duty to enter to make repairs, they were not liable for an injury caused by the defective condition of the pier during the continuance of the lease, since they had no notice of the defects. Ruger C. J., Danforth and Gray J.J., dissenting. *Ahern* v. *Steele*, 22 N. E. Rep. 193 (N. Y.).

This case is valuable for the thorough discussion, in both the majority and dissenting opinions, of the principles and decisions upon which depends a landlord's liability for a nuisance on leased premises.

MALICIOUS PROSECUTION — CIVIL ACTION. — "An action may be maintained for the prosecution of a civil suit maliciously and without probable cause, even though there was no interference with the person or property of the defendant" in the civil suit. — *McPherson* v. *Runyon*, 43 N. W. Rep. 392 (Minn.).

NEGLIGENCE — IMPUTABILITY — PARENT AND CHILD. — In an action by a child against a defendant for damages caused by negligence, the negligence of the parent cannot be imputed to the child. The law was thus settled for Iowa in *Wymore* v. *Mahaska County*, 43 N. W. Rep. 264 (Ia.).

NEGLIGENCE — RAILROAD CROSSING. — Where a railroad company maintains a crossing over a road which was not made public by law, and over which it was not bound to maintain a crossing, it will be held liable for injuries caused by negligent construction of the crossing. The court, after saying that the company was not bound to maintain such a crossing, says, "but if it voluntarily assumes to do so, knowing that it is a road in common use by the public, it in effect invites the use of it and proclaims it safe," etc. *Missouri Pacific Ry. Co.* v. *Bridges et ux.*, 12 S. W. Rep. 210 (Tex.).

PARTNERSHIP — LIABILITY OF DECEASED PARTNER'S ESTATE. — Articles of copartnership provided that on the death of either partner the business should be conducted by the survivor for five years; deceased's estate to receive profits and bear losses as it would have done had he lived. *Held*, this agreement only means that the property invested in the business, at the time of the partner's death, shall continue therein for five years, and therefore deceased's general estate is not liable for debts contracted during that period, by the surviving partner. *Stewart et al.* v. *Robinson et al.*, 22 N. E. Rep. 160 (N. Y.).

REAL PROPERTY — CONTINUOUS AND APPARENT EASEMENTS. — The testator built two houses on adjoining lots. They were two stories high, with a common partition wall. The upper rooms were reached by a stairway, wholly within one of the buildings, but attached to the partition wall. *Held*, that a devise of the other building carried the right to use the stairway according to the custom of the testator. *Howell* v. *Estes*, 12 S. W. Rep. 62 (Tex.).

The doctrine of a continuous and apparent easement was recognized by the court. This doctrine is one which is not recognized by all the States, some, as for example Massachusetts, holding that the easement to pass in such case must be strictly necessary to the enjoyment of the estate.

REAL PROPERTY — COVENANT AGAINST INCUMBRANCES — EXISTING EASEMENTS. — A buyer agreed to take certain land on delivery to him of an abstract of title showing the property to be free from incumbrances. A railroad had a right of way over the property. The buyer knew this at the time of the agreement, and that it enhanced the value of the property. *Held*, seller cannot have specific performance. The right of way is an incumbrance. *Farrington et al.* v. *Tourtelott*, 39 Fed. Rep. 738 (Mo.). See in accordance with this decision *Huyck* v. *Andrews*, 113 N. Y. 81, digested 3 HARV. L. REV. 94.

REAL PROPERTY COVENANTS RUNNING WITH THE LAND. — The owner of two estates conveyed one of them: "Provided always and these presents are upon this express condition" . . . that the premises should never be occupied as a tavern. The other estate was subsequently conveyed without any such provisions. Subsequently both estates were purchased by one Post. *Held*, the restrictive clause in the deed was a covenant running with the land, and not a condition subsequent, and was extinguished by the union of both estates in Post. The same words may create either a condition or a covenant depending upon the intention of the parties. *Post et al.* v. *Weil et al.*, 22 N. E. Rep. 145 (N. Y.).

SALE — CONDITIONAL UPON PAYMENT. — Where goods are sold upon express agreement that they are to be paid for on the receipt of invoice, the title does not pass until such payment; and where the vendee fails to comply with the condition, the vendor may recover the goods from a third person, a *bona fide* purchaser, to whom they were sold shortly after. *Harmon* v. *Goetter et al.*, 6 So. Rep. 93 (Ala.).

STATUTE OF FRAUDS — PROMISE TO PAY DEBT OF ANOTHER. — Plaintiff signed administrator's bond as surety at the request of defendant and latter agreed to indemnify him against loss. Plaintiff was warranted by defendant's language in presuming that the latter was the only administrator, but there was in fact another who was a

party to the same bond and for whose default the plaintiff became liable. *Held*, although defendant's promise of indemnity, for the other administrator, may be severable, it is not within the statute of frauds as being a promise to pay the debt of another. There was no debt of the other administrator, at the time the promise was made, and it was not made to one entitled to enforce such other administrator's liability. *Tighe* v. *Morrison*, 22 N. E. Rep. 164 (N. Y.).

STATUTE OF LIMITATIONS — TACKING INTERESTS. — Land which had been held adversely came into the hands of a receiver, by whom it was sold to the defendant. The time from the beginning of the adverse possession to the time of bringing action was sufficient to satisfy the Statute of Limitations, and it was held that there was a continuity of adverse holding, the receiver being the successor, or, perhaps, the *quasi* agent of the original holder. The interests were therefore to be tacked. *Verdery et al.* v. *Savannah, F. & W. Ry. Co.*, 9 S. E. Rep. 1133 (Ga.).

SURETYSHIP — RELEASE OF PRINCIPAL. — Plaintiff became surety on a builder's contract in consideration that the owner would pay him "from said contract, at its completion, the sum of $1,000." Before completion, the owner released the builder from the conditions of the contract and paid him the contract price, less $1,000 as agreed. He then refuses to pay the surety, because the builder has not fulfilled certain conditions. *Held*, that though no action lay against the surety, the owner can set off against his claim for the $1,000, the damage resulting from the builder's default. *St. Mary's College* v. *Meagher*, 11 S. W. Rep. 608 (Ky.).

TRUSTS — FOLLOWING TRUST PROPERTY. — The plaintiffs delivered certain quantities of iron rods to the New Haven Wire Co., on the agreement that the company should become the owners, on payment of advances made by the plaintiffs. It was also agreed that the company should have the power to sell the rods provided that it would turn over the proceeds to the plaintiffs. At some time later than May, 1887, the company sold part of the rods but mingled the proceeds with its own funds. On Sept. 7, 1887, the company went into the hands of a receiver. *Held*, that the trust money could not be followed and that the plaintiffs must come in with the other creditors. *Baring* v. *Galpin*, 18 Atl. Rep. 268 (Conn.).

USURY. — A loan is not usurious when the agent of the lender, in addition to the highest legal rate of interest, deducts his own fee from the amount of the loan, unless the deduction was made with the lender's knowledge. *Vahlberg* v. *Keaton*, 11 S. W. Rep. 878 (Ark.).

This seems to be the general rule. *Dagnell* v. *Wigley*, 11 East, 43; *Philo* v. *Butterfield*, 3 Neb. 256; *Estevez* v. *Purdy*, 66 N. Y. 446. Though there is some authority contra; *Austin* v. *Harrington*, 28 Vt. 130.

In a few jurisdictions it is held that knowledge on the part of the lendee will not make the loan usurious, provided he received no share of the bonus. *Conover* v. *Van Mater*, 18 N. J. Eq. 481.

WATER-RIGHTS — COVENANTS RUNNING WITH THE LAND. — A number of lots on the west side of a river were supplied with water for manufacturing purposes through "Brown's race." These lots were owned by different persons who were entitled in severalty to the use of the water in the "race." These owners banded together to purchase a lot on the east side of the river, and made an agreement which showed that each paid a share of the purchase price proportional to his water-power in "Brown's race," that the object of the purchase was to obtain the water belonging to the east-side lot for use in the "race," and that each of the purchasers was to use an amount of this new supply proportional to his former interest in the "race." All the existing rights of the purchasers to remain unaffected, and if the purpose of the purchase failed the land was to be again sold and the proceeds divided. *Held*, that this agreement consisted of personal covenants by the parties as to the manner of using the property, and there was no grant from one to another of interests in the several and independent estates on the "race" so as to make the covenants run with the land. Therefore these covenants bound no grantee of any party unless specifically imposed upon the grantee or assumed by him. *Lawrence et al.* v. *Whitney et al.*, 22 N. E. Rep. 174 (N. Y.).

WILLS — MURDER OF THE TESTATOR BY LEGATEE. — A legatee, who knows that the testator has some intentions of revoking his will to the legatee's disadvantage, and murders the testator to prevent such possible revocation, shall not take any benefit under the will or any interest in the estate.

Gray and Danforth, J.J., dissenting.

The argument of the majority of the court is, that no one shall be permitted to profit by his own fraud, or take advantage of his wrong; that there was no certainty that the testator would not change his will or even survive the legatee, and that, as the legatee by his crime made the will speak and have operation, if the will is allowed full effect, the legatee will profit by his own wrong. The civil law expressly provides that a legatee who has acted thus shall take none of the testator's property, and our law makers did not insert a similar provision in our statutes, because they thought that the maxims of the common law were sufficient to regulate such a case, and that a specific enactment for that purpose was not needed. The dissenting opinion delivered by Gray, J., contends that this matter is in no sense equitable, but that the court is bound by the statutory provisions as to altering and revoking wills; and since this will has not been revoked according to the statutes, it must have full effect. The reference to the civil law only furnishes an argument for making laws to meet such cases. The demands of public policy are satisfied by the punishment of the crime by the criminal courts, and to take away the legacy would be to impose an additional penalty. *Riggs* v. *Palmer*, 22 N. E. Rep. 188 (N. Y.).

In other cases where an heir or legatee has been forced by the court to give up some of the benefit which otherwise he would have received by descent, or under the will, the decisions have rested on the ground, that, as the defendant has by his fraud prevented the deceased from doing an act in favor of the plaintiff, the defendant is a constructive trustee of the property so acquired, and holds it for the benefit of the plaintiff. See *Luttrell* v. *Olmius*, 11 Ves. 638; *Goss* v. *Tracy*, 1 P. Wms. 287; *Lester* v. *Foxcroft*, Colle's Parlia. Cas. 108.

In this case it was not certain that the testator would ever revoke his will, or in whose favor a possible new will would be made. There is therefore no chance for a constructive trust since there is no one who can claim as *cestui*. Cases where the beneficiary of a life-insurance policy murders the assured, and is therefore not allowed to recover the insurance money, are not in point. A policy is a contract, and in order to recover the beneficiary must prove his right under the contract, which he clearly cannot do.

The principle of the case would seem to require that no legatee or heir take the property of a testator whom he has murdered, no matter what motive led him to commit the crime. It is peculiar that such an important principle should have been supported in the past by no cases directly in point. The only other court in which a like state of facts has been passed upon seems to have been in North Carolina (*Owens* v. *Owens*, 100 N. C. 240, referred to in the opinion of the majority), where the opposite result was reached.

REVIEW.

A BRIEF FOR THE TRIAL OF CRIMINAL CASES. By Austin Abbott, assisted by William C. Beecher, late Assistant District Attorney of the City of New York. New York: Diossy & Co., 1889. 8vo. pp. xvii. 566.

This is the second Brief from the pen of this author. The plan of these books is unique, and it would seem admirably adapted to the purpose. As the title indicates, the whole book is modelled on a brief. Principles are stated in clear, terse language, and in each case followed by a list of authorities. The scope of the work is well indicated by the author in the preface: "My aim has been to present those debatable questions which are now most constantly mooted at the trial, — to carry the exposition of each into sufficient detail to meet all ordinary aspects of the subject, and upon such questions to furnish counsel with the materials for discussion and discrimination, arranged in that concise, analytic form which we all find the most convenient as an aid to